IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 838 of 1992

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgment? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SUMANTHABHAI NATHUBHAI DESAI SELF AND AS HEIR OF PET.NO.3

Versus

HANSABEN W/O NARENDRA NANIBHAI DESAI

Appearance:

MRS KETTY A MEHTA for Petitioner Nos. 1-4

SERVED BY RPAD - (N) for Respondent No. 1-2,4-6

RULE UNSERVED for Respondent No. 1-6

MR AVINASH K MANKAD for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 23/03/2004

ORAL JUDGEMENT

1. The petitioners are the original defendants of a civil suit, being Small Civil Suit No.218 of 1980. The

respondents herein instituted the said suit for getting a decree for possession of the suit premises on the ground that the defendant-tenants have acquired alternative accommodation. It is also the case of the plaintiffs that the defendant-tenants have not used the suit premises for a continuous period of more than six months. It is also the case of the plaintiffs that the defendants have made permanent construction in the suit premises and that the defendants have committed an act of waste contrary to the provisions of Section 108 of the Transfer of Property Act.

2. One Nathubhai Desai was the original tenant and after his death, the suit was filed against the heirs, which consist of the widow and sons of the deceased-tenant.

3. The trial court, after appreciating the evidence on record, came to the conclusion that the plaintiffs have proved that the defendants have acquired suitable alternative accommodation. Ultimately, the trial court passed a decree for possession in favour of the plaintiffs on the ground of acquisition of alternative accommodation, as contemplated by Section 13(1)(l) of the Bombay Rent Act.

4. Originally, the suit was filed by the landlord, but since he died during the pendency of the suit, his heirs were brought on the record of the said suit and they continued the aforesaid suit.

5. Against the decree of the trial court, an appeal was preferred by the defendants, being Regular Civil Appeal No.17 of 1988. The appellate court dismissed the said appeal and confirmed the finding of the trial court regarding acquisition of alternative accommodation by the tenant under the provisions of Section 13(1)(l) of the Bombay Rent Act.

6. During the pendency of this revision, the widow of the original tenant, who was co-petitioner No.3, died and her heirs are also brought on record. It is required to be noted that two sons of the original tenant have, admittedly, acquired alternative accommodation. However, the question which requires consideration is whether the widow of the original tenant, viz., Parvatiben alias Paliben Nathubhai Desai, can be subjected to a decree under Section 13(1)(l) of the Bombay Rent Act. It is required to be noted that the widow of the deceased tenant cannot be compelled to go and stay with her sons in disputed premises against her wish and it cannot be

said that the acquisition of suitable premises by the sons can be said to be an acquisition by the widowed mother also.

In Aanandi D.Jadhav (dead) by L.Rs. v. Nirmala Ramchandra Kore and others, AIR 2000 SC 1388, a question arose as to whether a tenant can be evicted on the sons of the tenant building a house. On the said aspect, after quoting Section 13(1)(l) of the Act, the Honourable Supreme Court held as under :-

" ... ...

5. A plain reading of the above provision shows that under clause (l) a landlord is entitled to recover possession of a premises from any tenant provided the Court is satisfied that after coming into operation of the Act, the tenant has built or has acquired vacant possession of or has been allotted a suitable residence. From the scheme of the provision it is discernible that it is only when the tenant gets a right to reside in a house other than the demised premises on the happening of any one of the three alternatives mentioned therein, namely, either by building or by acquiring vacant possession of or by allotment of a house, that the landlord can seek recovery of possession of the demised premises from the tenant.

xxx xxx xxx

9. Now the question arises what is the ambit of the term 'tenant' in Section 5(11) of the Act. Insofar as it is relevant for our purpose, it reads thus :

"5(11), "tenant" means any person by whom or on whose account rent is payable for any premises and includes -

(a) such sub-tenants and other persons as have derived title under a tenant before the 1st day of February, 1973;

(aa) to (bba) *** *** *** ***

(c)(i) in relation to any premises let for residence, when the tenant dies, whether the death has occurred before or after the commencement of the Bombay

Rents, Hotel and Lodging House Rates Control (Amendment) Act, 1978, any member of the tenant's family residing with the tenant at the time of his death, or, in the absence of such members, any heir of the deceased tenant, as may be decided in default of agreement by the Court;

(c)(ii) *** ***

The definition of 'tenant' is too exhaustive to include any member of the family residing with him. Such members of his family who were residing with the tenant at the time of his death, or in their absence any heir of the deceased tenant, as maybe decided in default of agreement by the Court, would become tenant only on his death. It is true that the first respondent and her sons, respondents 2 and 3, were let into possession of the suit premises about 30 years before the institution of the suit but the first respondent alone was the tenant and respondents 2 and 3 were there as members of her family. They were, therefore, not tenants of the suit premises. The concurrent findings of the Courts below are that respondents 2 and 3 built the house for which the first respondent did not contribute any money; she did not shift her residence to the said house though she was visiting that house off and on. Inasmuch as the first respondent did not build any house and respondents 2 and 3 are not the tenants, the first of the three alternatives, referred to above, is not available to the appellant to seek eviction of the first respondent.

... ..."

In the said decision, another important point also arose for consideration of the Apex Court. It was observed by the Honourable Supreme Court that right of the infirm parent / mother to be maintained by sons does not entitle parent / mother to live in their house along with son's families. On the son, who was living with the mother-tenant, building a house, mother is not liable to

be evicted on the ground of having acquired vacant possession. The Supreme Court was of the view that acquiring vacant possession means acquiring possession of accommodation in which she has legal right to reside. Right of the mother / parent to reside in the house built by son is not legally enforceable. In this connection, the Supreme Court held as under in paragraph 10 of the said decision :-

" ... ...

10. Now with regard to the second alternative, namely, whether the first respondent acquired vacant possession of the house built by respondents 2 and 3, the learned counsel for the appellants has submitted that she is entitled to claim maintenance from them under Section 20 of the Hindu Adoptions and Maintenance Act which imposes an obligation on a son / daughter to maintain his / her infirm parents or the unmarried daughters who are unable to maintain himself / herself and, therefore, she acquired a right to live in the said house. The submission though attractive lacks substance. The first respondent being aged mother undoubtedly has a right to be maintained by respondents 2 and 3 but that does not mean that she is entitled to live along with her sons' families. The expression 'acquired vacant possession', in the context, in our view, means acquisition of vacant possession of a suitable accommodation in which one has a right to reside. It must be a legally enforceable right. The first respondent doe not have any such legal right to reside in the house of respondents 2 and 3. Though, it cannot be disputed that respondents 2 and 3 had for a period of 30 years before building their own house lived with the first respondent as her sons and morally they are obliged to take care of the aged mother by accommodating her in their house, yet in law we cannot enlarge that obligation to legal duty to provide her residence in the house along with their family. Thus, the second alternative will also have no application. Admittedly, the third alternative is not attracted to the facts of this case.

... ..."

7. The appellate court, after appreciating the evidence on record, has come to the conclusion that the

sons of the deceased tenant have acquired sufficient alternative accommodation and on that ground, the appellate court has confirmed the decree passed by the trial court. However, so far as the widow of the deceased tenant is concerned, the appellate court came to the conclusion that since she is not in a position to maintain herself independently, she cannot be treated as a separate unit and she is one of the members of the family of appellant No.1, i.e. Sumantbhai Nathubhai Desai, who is the son of the original deceased tenant. The appellate court has given a positive finding to the effect that appellants 1 and 2 (sons of the original defendant) are having their own independent bungalows, and accordingly, the finding given by the trial court regarding acquisition of alternative accommodation by the tenant under the provisions of Section 13(1)(l) of the Bombay Rent Act is confirmed by the appellate court. However, as stated earlier, the acquisition by the said sons cannot be said to be an acquisition even by the deceased tenant.

8. However, the subsequent development, which has taken place during the pendency of this revision is required to be taken note of. The widow of the deceased tenant, viz., Parvatiben alias Paliben Nathubhai Desai, has already died during the pendency of this revision and her sons, who are the only heirs, are already on the record of this revision. Since it has been found by both the courts below that both the sons have acquired suitable alternative accommodation, now, the question, whether it can be said that even the mother has acquired alternative accommodation, is of academic interest. That point is now not required to be considered in view of the subsequent development, i.e., the death of the widow. Since it is not in dispute that both the sons have acquired suitable alternative accommodation, the order of the appellate court is required to be confirmed, as both the courts below have found, after appreciating the evidence on record, that the defendants, i.e. heirs of the original tenant, have acquired suitable alternative accommodation. It is, therefore, now, not necessary to examine whether acquisition by the sons is an acquisition by the widowed mother. Under these circumstances, the order of the appellate court is required to be confirmed and since the petitioners have already acquired alternative accommodation and since both the courts have also found that the said accommodation is suitable and adequate, in my view, the decree passed by the courts below under Section 13(1)(l) of the Bombay Rent Act is required to be confirmed.

9. Under the above circumstances, this revision application is required to be dismissed and it is accordingly, dismissed. Rule is discharged. Interim relief is vacated, with no order as to costs.

23rd March, 2004 (P.B. Majmudar, J.)

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(apj)